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# Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR.,  
EXECUTORS OF THE ESTATE OF  
EDWARD F. GOLTRA, DECEASED,  
PETITIONERS,

v.  
THE UNITED STATES,  
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF CLAIMS.

HERMAN J. GALLOWAY,  
FREDERICK W. P. LORENZEN,  
*Attorneys for Petitioners.*

June, 1940.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1939.

No.

STATE B. GOLTRA AND E. FIELD GOLTRA, JR., Executors of the  
Estate of EDWARD F. GOLTRA, Deceased,  
*Petitioners,*

*v.*  
THE UNITED STATES,  
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioners pray that a writ of certiorari issue to review certain portions of the judgment of the Court of Claims in the above case.

### *Opinion Below.*

The opinion of the Court of Claims is not yet officially reported.

### *Jurisdiction.*

The judgment of the Court of Claims was entered on April 1, 1940. The judgment was rendered under a Special Jurisdictional Act which provides for an appeal as of right. In this case the respondent has appealed to this Court and the petitioners herein have been allowed a cross-appeal. The respondent has also filed a petition for writ of certiorari. The jurisdiction of this Court is invoked on this petition under Section 2(b) of the Act of February 13, 1925, as amended.

*Question Presented.*

Two principal categories of questions are presented. First, whether the Court of Claims in computing the amount of just compensation to be awarded to petitioners under the terms of the Special Jurisdictional Act erred in failing to take into consideration the rental value of the towboats and barges which it found were taken by the respondent for its use and benefit and whether that court erred in failing to consider the earning capacity of that fleet as measured by its rental value, and whether it also erred in failing to consider an offer made to lease the towboats and barges for a term of five years at a rental exceeding one million dollars per year. Second, if this Court grants respondent's petition for a writ of certiorari and on review decides that the Court of Claims should not have adjudged recovery here on the basis of the usual principles of just compensation but should have awarded the recovery upon the basis of a legal claim for damages, then the Court of Claims also erred in failing to take into consideration the rental value of the towboats and barges, the earning power of the towboats and barges as measured by their rental value, an offer made to lease the towboats and barges for a term of five years at a rental of over a million dollars a year, and prospective profits of which Goltra was deprived by the acts of respondent.

*Statutes Involved.*

The only statute involved is the Special Jurisdictional Act which is set forth in Appendix "A" (*infra*, p. 15).

*Statement.*

On May 28, 1919, Goltra and the United States, acting through the Chief of Engineers, entered into a contract, referred to in this case as the original contract, and on May 26, 1921, the same parties entered into a supplemental contract (Finding 6). These contracts, which are respectively Exhibits B and C to the petition (Finding 6), gave Goltra the right to possess a fleet of nineteen steel barges and four steel towboats

to be operated on the Mississippi River and its tributaries (Exhibit B of petition). Under the contract Goltra was to have possession as lessee for a term of five years after the delivery of the fleet (*id.*). The only rental payable was to consist of the net earnings of the fleet and these net earnings were to be credited to the purchase price of the fleet if Goltra exercised an option conferred upon him to purchase the fleet at an appraised value (*id.*). Under this option provision the balance of the purchase price was payable in fifteen equal annual instalments (*id.*). Goltra in fact twice exercised his option but respondent refused to perform the option provision (Findings 10 and 42). Goltra thus in addition to having a lessee's property rights in the fleet had the other property rights conferred upon him by the option provisions.

Before the fleet was completed and delivered to Goltra, the respondent established a barge line of its own on the Mississippi River (Finding 8). The existence of this competing barge line led to difficulties between Goltra and the Secretary of War under whose jurisdiction the competing line was operated (Findings 9, 11, 12, 13 and 14).

The original contract was subject to cancellation if in the judgment of the Chief of Engineers, who was designated the lessor, Goltra had not performed his obligations thereunder (Exhibit B of petition; Opinion p. 26).

Within a few months after the fleet had been delivered to Goltra (Findings 15 and 23), the Secretary of War, not the Chief of Engineers, purported to cancel Goltra's contract and he demanded a return of the fleet by delivery to Colonel Ashburn, Chief of the competing Government barge line (Finding 23). Goltra refused to comply with the Secretary of War's demand (Finding 25). Thereafter, on March 22, 1923, Colonel Ashburn was authorized by the Acting Secretary of War to take possession of the Goltra fleet (Finding 27).

The manner in which Colonel Ashburn carried out this mandate is described by the Court of Claims as follows (Finding 28):

"On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command,

acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States."

The Goltra fleet remained in the custody of respondent until September, 1924 (Finding 37). Under a temporary restraining order issued September 4, 1924, possession of the fleet was temporarily returned to Goltra (Finding 39) but after further court action the injunction was dissolved and the property was returned to respondent in August, 1926 (Finding 40). Since that time "defendant [respondent] has retained possession of the boats and barges \* \* \* and has caused the same to be operated as a part of the Mississippi Warrior Service" (Finding 40).

The Court of Clair found that Goltra had performed all his obligations under the contracts (Finding 32, 33, 34, 35; Opinion p. 27). Furthermore, the Chief of Engineers, to whose judgment the contracts had entrusted the determination of whether Goltra had or had not performed his contract, at no time formed a judgment that Goltra had not performed his obligations thereunder (Findings 31, 38; Opinion p. 29).

Goltra expended very substantial sums in connection with the original and supplemental contracts, including sums for improving the fleet, certain real estate used in connection therewith and repairing damage done to the fleet by respondent (Findings 43, 44, 45, 46, 47, 48, 50, 51). For these expenditures Goltra was never reimbursed and respondent benefited thereby when it took the property (*id.* and Finding 33).

It follows that when the respondent took possession of Goltra's fleet for the use and benefit of the United States, the right to possession and other contract rights in relation to the fleet, which were valuable property rights and belonged to Goltra, were taken from him.

By the Special Jurisdictional Act herein, jurisdiction was conferred upon the Court of Claims, "whose duty it shall be,

notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith;" \* \* \*

The Court of Claims held that petitioners were entitled to recover in order to constitute "just compensation" the sum of \$350,000, with interest at six percent (6%) per annum, not as interest but as a part of "just compensation" from March 25, 1923, to the date of payment.

The record in this Court shows that evidence was offered of the reasonable market rental values of the boats and barges on the Mississippi River and its tributaries during the pertinent times. The record further shows that officials of the Standard Oil Company of Louisiana testified as witnesses on behalf of the petitioners that in May, 1925, when Goltra had the fleet under the court order in the original litigation, the Standard Oil Company of Louisiana, which was financially solvent and able to carry out such an arrangement, offered to lease the fleet from Goltra for a period of five years, with an option to renew for an additional period of five years, on a bare boat basis for a rental of over \$1,000,000 per annum. Such an arrangement would have resulted in a clear profit to Goltra of practically the entire sum of \$1,000,000 a year. The Court of Claims, in its opinion, stated: "It is contended by the plaintiff that, in arriving at just compensation an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions can not be sustained" (opinion p. 30).

*Specifications of Errors to be Urged.*

- I. The Court of Claims erred in failing to make the following special findings of fact requested by petitioners, each of which

was made by the Commissioner of this Court assigned to hear this cause:

A. The requested special finding of fact embodied in the Commissioner's finding 59, which is as follows:

"The average cost of the towboats was \$375,000 each. The average cost of the barges was \$110,000 each.

"The value of the towboats and the barges from the year 1922 and thereafter until the end of the year 1924 was approximately the same as the original cost thereof."

B. The requested special finding of fact embodied in the Commissioner's finding 60, which is as follows:

"The reasonable market rental value on the Mississippi River and its tributaries of the towboats from March, 1922, to the present time was 1/15th of one per cent per day of the cost of each towboat, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of the towboats to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of \$2,000 per year per towboat.

"The reasonable market rental value on the Mississippi River and its tributaries of the barges from March, 1922, to the present time was 1/10th of one per cent per day of the cost of each barge, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of said barges to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of \$500 per year per barge."

C. The requested special finding of fact embodied in the Commissioner's finding 61, which is as follows:

"In May, 1925, C. J. Fiero, vice president and general manager of Standard Oil Company of Louisiana, and

E. F. Wieck, superintendent of lighterage of that company, desired to acquire for that company the use of the barges and towboats for the transportation of crude oil from its pipe line terminal at Grand Lake, Arkansas, down the Mississippi River to its refinery at Baton Rouge, Louisiana, and for the transportation of refined oils up the river from Baton Rouge on the return trips, and for this purpose made an offer in behalf of Standard Oil Company of Louisiana to lease from plaintiff the nineteen barges and four towboats upon the following terms: Standard Oil Company of Louisiana was to furnish all of the crew, food, fuel, and other supplies and to assume all risks and costs of insurance, maintenance, repairs, and all other costs of operation, and was to pay to plaintiff rental at the rate of 1/15th of one per cent per day on the cost of said towboats, assumed to be \$400,000 each, and 1/10th of one per cent per day on the cost of said barges, assumed to be \$110,000 each, for a period of five years with the option to Standard Oil Company of Louisiana to continue to lease upon such terms for an additional period of five years. Plaintiff was willing and desired to accept the offer, but on account of the then pending litigation over his right to continue in possession of the barges and towboats, he was unable to do so as he could not assure Standard Oil Company of Louisiana of possession of the barges and towboats for the terms of the proposed lease. This offer was made in good faith and Standard Oil Company of Louisiana was at all times financially able to carry out the obligations which would have devolved upon it had a lease been made pursuant to its offer."

D. The requested special finding of fact embodied in the Commissioner's finding 62, which is as follows:

"In the years 1922 through 1924, it would have been impossible for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least two years after the date of the letting of the contracts therefor to have such barges and towboats built.

"In the year 1926 it would have been impossible for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least twenty months after the date

of the letting of the contracts therefor to have such barges and towboats built."

E. The requested special finding of fact embodied in the Commissioner's finding 64, which is as follows:

"On March 25, 1923, the towboats and barges had a remaining normal and useful life of about thirty years."

F. The requested special finding of fact embodied in the Commissioner's finding 66, which is as follows:

"The land provided by plaintiff for the unloading facilities had a reasonable value of \$20,000 throughout the period from 1921 to 1931."

G. The requested special finding of fact embodied in the Commissioner's finding 68, which is as follows:

"The erection of the unloading facilities on the runways under the provisions of the supplemental contract cost \$210,000."

H. The requested special finding of fact embodied in the Commissioner's finding 71, which is as follows:

"During the period from March 25, 1923, to the present time, the reasonable rental value of the unloading facilities was \$25,000 per year."

I. The requested special finding of fact embodied in the Commissioner's finding 72, which is as follows:

"From the time when plaintiff surrendered the unloading facilities to defendant in July, 1926, pursuant to the court order, to the present time, plaintiff has provided one day and one night watchman for necessary services in watching the unloading facilities for the benefit of defendant and has obligated himself to pay or has paid \$125 per month for each watchman, which was a reasonable expense therefor and for which plaintiff has never been paid."

J. The requested special finding of fact embodied in the Commissioner's finding 75, which is as follows:

"In the years 1923 through 1926, both inclusive, if any loan had been negotiated for a sum of money sufficient to reproduce the towboats and barges under a loan agreement permitting and requiring repayment in fifteen equal annual installments during a period of fifteen years commencing one year after the making of the loan, the borrower would have been required to pay interest on such loan for the duration thereof at the rate of 6.138 per cent per year. In addition the borrower would have been required to pay a substantial commission or discount and to give as a bonus an interest in the operation of the towboats and barges."

II. The Court of Claims erred in failing to take into consideration in determining the amount of recovery an offer made by the Standard Oil Company of Louisiana to rent the Goltra fleet, the substance of which offer is embodied in the requested special finding of fact which is the Commissioner's finding 61, set forth above.

III. The Court of Claims erred in finding and concluding that there was no market value for Edward F. Goltra's lease of said fleet and the option to purchase.

IV. The Court of Claims erred in failing to take into consideration, in arriving at the award made to the petitioners an amount measured by the net reasonable market rental value of said fleet on the Mississippi River and its tributaries from March, 1922, to the date of judgment.

V. The Court of Claims erred in failing to take into consideration, in arriving at the award made to the petitioners an amount measured by the rental value of said fleet which amount said fleet could and would have earned but for the seizure of said fleet by respondent's officers for the use and benefit of respondent.

VI. The Court of Claims erred in failing to take into consideration in arriving at the award made to the petitioners prospective profits which would have resulted from petitioners property rights in said fleet but for the seizure thereof by representatives of respondent for the use and benefit of respondent.

VII. The Court of Claims erred in limiting the amount of recovery by way of just compensation to the sum of \$350,000 with interest at six per cent, per annum, not as interest, but as part of just compensation.

*Reasons for Granting Writ.*

The Court of Claims has determined that recovery in this case should be adjudged on the basis of just compensation as indicated in the Special Jurisdictional Act. The Court of Claims, however, erred in failing to take into consideration certain elements necessary to arrive at just compensation.

This petition is essentially a cross-petition made necessary by the respondent's petition for a writ of certiorari. Respondent contends in its petition that the Court of Claims erred in determining the amount of recovery. If this Court determines to review the judgment of the Court of Claims as to the amount of recovery, then the petitioners believe that the entire question of the amount of compensation should be reviewed. A serious wrong would be done petitioners if this Court should determine on respondent's petition that recovery should not be measured by just compensation as that term has been heretofore defined and should therefore deprive the petitioners of a sum measured by interest without directing the Court of Claims in entering judgment to take into account other elements which should certainly in that event be considered.

Petitioners concede that if this Court does not grant respondent's petition for a writ of certiorari and if this Court holds that an appeal as of right does not lie in this case under the Special Jurisdictional Act, then no grounds for review of the judgment below are presented and no basis for this petition exists.

A. *The Court of Claims Committed Prejudicial Error in Failing to Take Into Consideration Certain Evidence Bearing on the Question of Just Compensation.*

The Court of Claims in its opinion (p. 30) has stated specifically that it has not taken into consideration an offer for the rental of the fleet or the rental value of similar vessels. We suppose that the latter phrase refers to the evidence of reasonable market rental value offered by petitioners. The record as stipulated on this petition shows that there was a substantial rental value for the fleet and that an offer to rent the fleet at a sum in excess of a million dollars a year was made in good faith by a corporation adequately financed to carry out the offer.

The award of just compensation entitles petitioners to the full and perfect equivalent of the property taken paid contemporaneously with the taking. *Monongahela Navigat'n Co. v. United States*, 148 U. S. 312, 328, 329, 343; *Seaboard Air Line Ry. v. U. S.*, 261 U. S. 299, 304; *U. S. v. New River Collieries*, 262 U. S. 341, 343, 345; *Brooks-Scanlon Corp. v. U. S.*, 265 U. S. 106, 123, 126; *Phelps v. United States*, 274 U. S. 341, 344.

In *Monongahela Navigat'n Co. v. United States*, 148 U. S. 312, *supra*, this Court held that the full and perfect equivalent of property "generally speaking, is determined by its productivity—the profits which its use brings to the owner" (p. 328). It is impossible to see how just compensation in this case can be determined without taking into account the productive value of the fleet taken, namely, its rental value. It is that rental value which measured the usefulness of the fleet. The taking of the fleet deprived Goltra of that element. Indeed, the Court of Claims in *Hudson Navigation Co. v. U. S.*, 57 C. Cls. 411, 415, 416-417, and *Gulf Refining Co. v. U. S.*, 58 C. Cls. 559, 577, has heretofore recognized that the rental value of ships is a factor to be considered in awarding just compensation. Failure to take into account the use or rental value of the fleet here has deprived the petitioners of a large element of value which should have entered into a determination of the final award.

An award as small as the principal award made in this case,

taking into consideration the fact that more than half of the sum of \$350,000 is comprised of items of out-of-pocket expenditures (Findings 43, 44, 45, 46, 47, 48, 50, 51; Opinion, pp. 30-31), indicates clearly the prejudice which resulted to petitioners from a failure to take into consideration not only the rental value of the fleet but the actual offer made to rent the entire fleet for a period of five years at a net rental of approximately one million dollars a year. The record stipulated on this petition shows that this offer was made in good faith by a responsible concern and that there was no objection to the evidence which established this offer at the time when such evidence was introduced. Respondent thus seems to be estopped to question the competency of the offer for rental.

Furthermore, the cases of *Sharp v. United States*, 191 U. S. 341; *Clark v. Hot Springs Electric Light & Power Co.*, 55 Fed. (2d) 612; and *Sommers v. Commissioner of Internal Revenue*, 63 Fed. (2d) 551, dealing with real estate matters, do not prevent a consideration of this offer in this case. In the *Sharp* case this Court decided that in valuing real estate the unsupported testimony of the claimant with respect to an offer made to him was not admissible but the Court's opinion expressly recognizes the possibility that offers made, particularly for chattels, would under proper circumstances be admissible in evidence. This court indicated that an offer was admissible and had probative value if it was (p. 349) " \* \* \* an honest offer made by an individual capable of forming a fair and intelligent judgment, really desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer." The stipulated record in this case clearly shows that the present offer comes within the rule as thus stated and was established by the testimony of those who made the offer.

Whether the distinction between offers for real estate and offers for chattels is or is not a sound one, the authorities seem to be uniform that bona fide offers for chattels if pertinent in point of time are admissible in evidence where value of chattels is in issue. *Heiner v. Crosby*, 3 Cir., 24 Fed. (2d) 191, 193; *The Waalhaven*, S. D. N. Y., 1 Fed. Supp. 396, 397, affirmed 64 Fed. (2d) 25, cert. denied 289 U. S. 752; *Republican News-*

*paper Co. v. Northwestern Associated Press*, 8 Cir., 51 Fed. 377. The rule has been similarly established in the State courts. *German-Am. etc. Bank v. Spokane etc. Nav. Co.*, 49 Wash. 359, 360-361; *Rottlesberger v. Hanley*, 155 Iowa 638, 647; *Georgia, Florida & Alabama Railway Co. v. Spivey*, 14 Ga. App. 157; see also *Gatling v. Newell*, 9 Ind. 572, 583; *Chamberlayne*, The Modern Law of Evidence (Vol. 3, Sec. 2175g).

There is a tendency even in real estate cases to admit evidence of offers made in good faith and proved beyond question. *North American Telegraph Co. v. Northern Pac. Ry. Co.*, 8 Cir., 254 Fed. 417, 418, 419; *Faust v. Hosford*, 119 Iowa 97, 104; *City of Chicago v. Lehmann*, 262 Ill. 468, 474.

As the making of the offer in the present case is not disputed and its good faith is unquestioned, we believe that under the foregoing authorities the evidence in the present case should have been considered in determining the use value of the fleet for the purpose of arriving at an award of just compensation based in part upon that value.

B. *If this Court on Respondent's Petition for a Writ of Certiorari Determines that the Award Here Should not be Based upon the Usual Principles of Just Compensation, then a fortiori the Rental Value of the Fleet and the Offer to Lease should be Considered upon a Recomputation of the Award.*

It seems to be respondent's contention that the Special Jurisdictional Act in using the words "just compensation" did not intend a mandate to award compensation on that basis. Petitioners have argued elsewhere the error inherent in respondent's contention. If this Court should, however, conclude that an award here must be based upon legal principles of damages applicable in tort or contract cases then it is clear that the market rental value of the fleet must form a part of the judgment to be awarded. In cases involving torts or breach of contract with relation to ships, the courts in this country have adopted a theory of objective compensation, giving to the owner the rental value of the ship irrespective of

whether profits could have been realized or whether the owner in fact would or could have chartered the ship in question: *Williamson et al. v. Barrett*, 13 How. 101, 111, 112; *The Lagonda*, E. D. N. Y., 44 Fed. 367, 369; *Jackson v. Innes*, 231 Mass. 558, 560-561; 39 Harvard Law Review, 760; 27 Columbia Law Review, 98.

The rule is well stated in *Jackson v. Innes, supra*, where defendant "with force and arms took and carried away" (p. 559) the plaintiff's boat and converted it to his own use. The Supreme Court of Massachusetts stated the measure of plaintiff's recovery as follows (pp. 560-561):

"The plaintiff who is entitled to full compensation for all the injury suffered also can have damages for the loss of the use of the boat during the period of detention. It is of no consequence that no income was derived from it. The defendant who is a wrongdoer can not avoid liability on that ground. \* \* \* And evidence of the fair market rental value for the use of the boat was admissible on the question of damages."

If as respondent now contends the present taking was a tort and the usual measure of damages for a tort is here applicable, then the decision in *Jackson v. Innes, supra*, precisely fits the case.

The argument above made (pp. 11 to 13) with reference to the offer to rent the Goltra barges is equally applicable whether the measure of recovery is just compensation or legal damages. The question is merely one of the competency and probative force of the offer under the cases cited. The offer must also be considered in arriving at any legal damages to be awarded the petitioners.

#### *Conclusion.*

It is respectfully submitted that, for the reasons stated, this petition for a writ of certiorari should be granted.

HERMAN J. GALLOWAY,  
FREDERICK W. P. LORENZEN,  
Attorneys for Petitioners.

June, 1940.

## APPENDIX "A."

## AN ACT

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: *Provided*, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: *Provided further*, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.